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Nos. 94-1664 and 94-8842

In the Supreme Court of the United States

OCTOBER TERM, 1994

STACEY C. KOON, PETITIONER

v.

UNITED STATES OF AMERICA

LAURENCE M. POWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in exercising de novo review over the district court's downward departures under the Sentencing Guidelines.

2. Whether the court of appeals applied the correct legal standard in finding that testimony of a government witness was not tainted by exposure to compelled statements made by petitioners.

3. Whether the jury was properly instructed on the count charging petitioner Koon with depriving the victim in this case of his right to be kept free from harm while in official custody.

4. Whether successive state and federal prosecutions of petitioners for the same conduct violated the Double Jeopardy Clause.

5. Whether a remark made by government counsel in closing argument constituted plain error.

6. Whether the admission of the videotape of co-defendant Briseno's testimony from the state trial violated the Confrontation Clause.

7. Whether the jury was properly instructed on the element of willfulness.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-79a)[1] is reported at 34 F.3d 1416. The sentencing opinion of the district court (Pet. App. 94a-138a) is reported at 833 F. Supp. 769.

[1] "Pet. App." references are to the appendix to the petition in No. 94-1664.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1994. The petitions for rehearing were denied on January 12, 1995. Pet. App. 80a-81a. Koon's petition for a writ of certiorari was filed on April 10, 1995. Powell's petition for a writ of certiorari was filed on April 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner Powell was convicted of willfully striking Rodney King during his arrest, in violation of 18 U.S.C. 242. Petitioner Koon was convicted of willfully permitting other police officers to strike King during his arrest, in violation of 18 U.S.C. 242. Petitioners were sentenced to 30 months' imprisonment. The court of appeals affirmed the convictions, but vacated the sentences and remanded for sentencing.

1. In the early morning hours of March 3, 1991, Rodney King was speeding on a freeway in Los Angeles, California. Los Angeles Police Department (LAPD) officers pursued King. The pursuit ended when King pulled his car over at an entrance to the Hansen Dam recreation area. Petitioner Powell was one of the LAPD officers who pursued King. Petitioner Koon, an LAPD sergeant, arrived after the pursuit had ended, and took command of the scene. Pet. App. 2a.

Officers ordered King and his two passengers to get out of the car and assume a felony prone position, *i.e.* to lie face down on the ground, with arms and legs spread. The two passengers complied with the officers' instructions. King got out of the car, but did

not lie down. Eventually, King got down on his hands and knees but did not assume the felony prone position. Four officers, including Powell, attempted to force King into that position. King resisted, and the officers retreated. Koon fired two taser darts from an electric stun gun into King. Pet. App. 2a.

The events that followed were captured on the Holliday videotape, which was an exhibit at trial. As the videotape begins, it shows that King rose from the ground in an attempt to escape. When he charged in Powell's direction, Powell struck King with his baton. Powell and another officer continued to strike King with their batons, and King fell to the ground. From the 18th to the 30th second on the tape, King attempted to get up, and Powell and the other officer again struck King with their batons. Pet. App. 2a-3a.

From the 35th to the 51st second, Powell repeatedly struck King with his baton. At approximately the 43d second, one of the blows fractured King's leg. At the 55th second, Powell struck King on the chest, and King rolled onto his stomach and lay prone. At that point, the officers stepped back and observed King for approximately ten seconds. Powell began to reach for his handcuffs. Pet. App. 3a.

At 1:07 on the video tape, officer Briseno stomped on King. After King writhed in response, Powell and another officer hit King with a series of baton blows. At approximately 1:29, King put his hands behind his neck and he was then handcuffed. King was treated at the hospital for a fractured right leg, multiple facial fractures, and multiple bruises and contusions. Pet. App. 3a.

Petitioners and two other officers were tried in state court in Simi Valley, California, on charges of assault with a deadly weapon and excessive use of force

by a police officer. The four officers were acquitted on all charges, except for one count against Powell that resulted in a hung jury. Pet. App. 4a.

2. Thereafter, petitioners and the other two officers were indicted by a federal grand jury. Powell and the other two officers were charged with willfully using unreasonable force during the arrest, in violation of 18 U.S.C. 242. Koon was charged with willfully permitting the other officers to strike King, in violation of 18 U.S.C. 242. After a trial, a jury convicted petitioners and acquitted the other two officers. Pet. App. 4a.

Petitioners' offense level and Criminal History Category led to a prescribed sentencing range of 70-87 months' imprisonment. The district court awarded a five-level and a three-level departure, however, which led to a prescribed range of 30-37 months. The district court then sentenced petitioners to 30 months' imprisonment. Pet. App. 94a-138a.

The court awarded a five-level downward departure under Sentencing Guidelines § 5K2.10, reasoning that King's misconduct had provoked petitioners' initial use of force and that the incident involved a "dynamic arrest situation." Pet. App. 57a, 121a-124a, 132a. The court granted an additional three-level downward departure based on three factors: (1) the additional punishment resulting from petitioners' loss of their jobs and susceptibility to abuse in prison; (2) the absence of a need to protect the public from further criminal activity; and (3) the "specter of unfairness" resulting from successive state and federal prosecutions for the same conduct. *Id.* at 124a-131a.

3. The court of appeals affirmed petitioners' convictions. The court vacated petitioners' sentences,

however, and remanded for resentencing. Pet. App. 1a-79a.

The court first held that the admission of a videotape recording of co-defendant Briseno's state court testimony did not violate the Confrontation Clause because petitioners had an adequate opportunity to cross-examine Briseno at the state court trial. Pet. App. 4a-9a. The court rejected petitioners' contention that they lacked such an opportunity because they did not have access to enhancements to the Holliday videotape. *Id.* at 7a-8a. The court explained that petitioners' "failure to take full advantage of their opportunity to cross-examine in the first trial—by developing those tools earlier—cannot alter the fact that they *had* the opportunity." *Id.* at 8a.

The court also rejected petitioners' contention that Briseno's testimony was tainted because he was exposed to compelled statements made by petitioners to the LAPD Internal Affairs Division. Pet. App. 14a-20a. The court held that the government's burden under *Kastigar* v. *United States*, 406 U.S. 441 (1972), was to show that "each matter as to which the witness will testify is derived from a source independent of the immunized testimony." Pet. App. 15a-16a. The court held that the government had satisfied that burden by showing that Briseno was an eyewitness to the events. *Id.* at 20a. The court also noted that Briseno had access to numerous other legitimate sources to refresh his testimony, including the Holliday videotape and petitioners' own state court testimony. *Ibid.*

The court next held that the successive state and federal prosecutions of petitioners did not violate the Double Jeopardy Clause. Pet. App. 30a-32a. The court noted that this Court has held that the Double Jeopardy Clause permits successive prosecutions of

the same conduct by different sovereigns. *Id.* at 30a. While the Ninth Circuit recognizes an exception to the dual sovereignty rule where the second prosecution is a "sham" pursued on behalf of the first sovereign, the court found no evidence of such a "sham" in this case. *Id.* at 30a-32a.

The court rejected petitioners' contention that certain remarks in the government's closing argument, to which they did not object at trial, constituted plain error. Pet. App. 40a-45a. The court found that only one of the challenged remarks was improper—an observation that the Holliday videotape had caused "horror and outrage" from "Paris to Tokyo." *Id.* at 44a. That remark, the court concluded, did not constitute plain error, because it was isolated, the jury was instructed to base its verdict only on the evidence, and there was substantial independent evidence to support the verdict. *Id.* at 44a-45a.

The court held that the jury was correctly instructed that Koon had a duty to intervene to protect King from an "unreasonable" use of force by other officers, not from force that was "intended as punishment" or "shocking to the conscience." Pet. App. 46a-51a. The court explained that "[b]ecause the third-party actors were officers attempting to make an arrest, Koon's Fourteenth Amendment duties to the custodial subject were to protect against * * * such force as was unreasonable." *Id.* at 50a. The court also held that the jury was correctly instructed that a person is in official custody when a reasonable person would have believed that he or she was not free to leave. *Id.* at 51a-52a. The court concluded that while that standard is derived from a Fourth Amendment case, "the same definition of 'custody' applies in the Fourteenth Amendment context." *Id.* at 51a.

The court further held that the jury had been properly instructed on the element of willfulness. Pet. App. 52a-54a. The court concluded that the instructions made clear that the government was required to show that petitioners acted with the specific intent to violate King's constitutional rights. *Ibid.*

Turning to the sentencing issues, the court first held that none of the factors considered by the district court in awarding a three-level departure was a permissible ground for a departure. Pet. App. 58a-69a. The court concluded that "[p]ersonal and professional consequences that stem from a criminal conviction are not appropriate grounds for departing" because "[t]hey are not tied to any penological purpose or legitimate sentencing concern expressed in the federal sentencing statutes." *Id.* at 62a. Any attempt to separate collateral consequences that should serve as a ground for a departure from those that should not, the court added, "would be boundless in the moral, social, and psychological examinations it required courts to make" and "can only lead to huge disparities in sentencing." *Id.* at 62a-63a. For similar reasons, the court rejected the view that a departure is permissible when a person's status makes him more susceptible to abuse in prison. *Id.* at 64a-66a. The court explained that the inquiry required by such a departure ground is both "subjective and open-ended" and "the number of defendants who might qualify * * * is virtually unlimited." *Ibid.* The court held that a departure because petitioners are unlikely to engage in future unlawful conduct was unwarranted since the lower limit of Criminal History Category I is set for an offender with the lowest risk of recidivism. *Id.* at 67a-68a. Finally, the court concluded that the "specter of unfairness" of dual

prosecutions was not a permissible departure ground "because it speaks neither to the culpability of the defendant, the severity of the offense, nor to some other legitimate sentencing concern." *Id.* at 68a-69a. The court added that recognizing such a departure ground in this case would undermine the Attorney General's determination that a distinct federal interest warranted a second prosecution. *Id.* at 69a.

The court also held that a five-level departure for victim misconduct was not justified because the district court found that King's misconduct provoked only the initial use of force, not petitioners' unlawful conduct. Pet. App. 70a-71a. The court further held that the volatility of the incident in conjunction with the initial provocation also did not furnish a ground for departure. *Id.* at 72a-73a. The court reasoned that such volatility is incorporated "into the basic fabric of the law in this area," and is therefore "typical—not unusual." *Id.* at 73a. The court noted that ordinary provocation can be a mitigating factor when assault is committed by a civilian. It held, however, that because the Guidelines treat assaults committed by public officials more seriously than assaults committed by civilians, only extreme provocation would justify a departure when the defendant is a public official. *Id.* at 76a & n.38.

The panel voted to deny rehearing, and the full court voted to deny the suggestion for rehearing en banc. Pet. App. 80a-81a. Judge Reinhardt, joined by eight other judges, would have granted rehearing en banc on the sentencing issues. *Id.* at 81a-93a.

ARGUMENT

1. Petitioners contend (Koon Pet. 12-18; Powell Pet. 32-41) that the court of appeals erred in failing to

defer to the district court's decision to depart downward from the sentencing range specified by the Sentencing Guidelines. That contention is without merit.

As the court of appeals concluded (Pet. App. 58a-69a), the factors relied upon by the district court to justify its three-level departure are not permissible grounds for a departure. In particular, the personal and professional consequences that stem from a criminal conviction are not appropriate grounds for departing because "[t]hey are not tied to any penological purpose or legitimate sentencing concern expressed in the federal sentencing statutes," and because permitting departures on those grounds "can only lead to huge sentencing disparities." *Id.* at 62a-63a. A departure based on the susceptibility of police officers to abuse in prison would be inconsistent with the purposes of the Guidelines because it provides "an unlimited open-ended rationale for departing," that would be equally available to gang members, police informants, and child abusers. *Id.* at 65a. A departure based on the unlikelihood of future criminal activity by petitioners is inconsistent with the Guidelines because the lower limit of Criminal History Category I already takes that factor into account. *Id.* at 67a-68a. And a departure based on the perceived unfairness of successive state and federal prosecutions conflicts with the purposes of the Guidelines because that ground "speaks neither to the culpability of the defendant, the severity of the offense, nor to some other legitimate sentencing concern" and because permitting a departure on that ground would undermine the Attorney General's determination that a distinct federal interest warrants a federal prosecution. *Id.* at 68a-69a.

The court of appeals was similarly correct in holding (Pet. App. 70a-76a) that a departure based on victim misconduct was unwarranted in this case. Guidelines § 5K2.10 limits departures based on the victim's misconduct to cases where the misconduct "contribute[s] significantly to provoking the offense behavior." Pet. App. 70a. The district court found that while King's misconduct provoked the initial use of force against King, it did not provoke petitioners' unlawful conduct. *Id.* at 70a-71a. Accordingly, the plain language of Section 5K2.10 does not support a departure based on victim misconduct. In addition, as the court of appeals concluded (Pet. App. 73a), provocation in a volatile arrest setting is a factor that is "built into the most fundamental structure of excessive force jurisprudence." See *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."). For that reason, the excessive force Guidelines Section (§ 2H1.4) necessarily takes that factor into account in typical cases. Pet. App. 73a.

Petitioners contend (Koon Pet. 12; Powell Pet. 32) that the court of appeals' exercise of de novo review over the district court's departure decisions conflicts with the general approach for appellate review of departure decisions set forth in *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993). There is, however, no such conflict. In *Rivera*, the First Circuit held that plenary review is appropriate "where the question on review is simply whether or not the allegedly special circumstances (i.e., the reasons for

departure) are of the 'kind' that the Guidelines, *in principle*, permit the sentencing court to consider at all." 944 F.2d at 951. The court also held that plenary review is appropriate where the appellate court performs the "quintessentially legal" function of interpreting the Guidelines in light of their "intention and purpose." *Ibid.* In contrast, the court held that, because a district court is better situated to determine whether the particular circumstances of a case make it unusual, an appellate court must ordinarily defer to such fact-based judgments. *Id.* at 951-952.

The court's exercise of de novo review in this case is consistent with the approach outlined in *Rivera*. As discussed above, the court rejected the district court's three-level departure because it concluded that the factors relied upon by the district court to support that departure are not of the kind that the Guidelines permit a sentencing court to consider at all. And the court rejected the five-level departure for victim misconduct on the basis of its interpretation of the victim misconduct and excessive force Guidelines Sections. Those are the kind of legal determinations that *Rivera* holds are subject to de novo review. To the extent that petitioner seeks review "concerning the appropriate factors to be considered by a district court in determining whether to depart from the Sentencing Guidelines" (Pet. 12), that issue may be resolved by the Sentencing Commission. See *Braxton* v. *United States*, 500 U.S. 344, 348-349 (1990). It does not warrant review by this Court.

Petitioners also err in contending (Koon Pet. 17; Powell Pet. 39) that the court's decision on the victim misconduct departure conflicts with *United States* v. *Yellow Earrings*, 891 F.2d 650 (8th Cir. 1989). In that case, the defendant was a woman who stabbed a larger

intoxicated man after he had pushed her, verbally abused her, and publicly humiliated her because she refused to have sex with him. *Id.* at 651. On those facts, the Eighth Circuit held that a departure for victim misconduct was warranted. Unlike the situation here, the district court in *Yellow Earrings* found that the victim's misconduct did not merely precede the defendant's unlawful conduct, but actually provoked it. *Id.* at 652-654. Moreover, the defendant in *Yellow Earrings* was a civilian. That case therefore did not raise any question concerning the circumstances under which victim misconduct should be viewed as a mitigating factor in cases involving the use of excessive force by police officers. For those reasons, *Yellow Earrings* is inapposite here.

2. Koon argues (Koon Pet. 18-21) that the court of appeals applied the wrong standard in deciding that co-defendant Briseno's videotaped state court testimony was not tainted by his exposure to compelled statements that petitioners gave to the Internal Affairs Division of the LAPD. Briseno had obtained those statements because he was facing disciplinary proceedings and he had a right under state law to discovery of all evidence relevant to that proceeding. Pet. App. 20a n.14. Koon's argument is without merit.

a. In *Kastigar* v. *United States*, 406 U.S. 441 (1972), the Court held that the Self-Incrimination Clause of the Fifth Amendment precludes the government from using compelled statements or evidence derived from them in a federal criminal trial. Under *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), that protection extends to public employees, such as petitioners, who give statements under a threat of removal from office. Once a defendant demonstrates that he has given a compelled statement, *Kastigar* requires prosecuting

authorities to demonstrate that "their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." 406 U.S. at 460.

The standard applied by the court of appeals in deciding that Briseno's testimony was not tainted by his exposure to petitioners' compelled statements is identical to the standard set forth in *Kastigar*. Pet. App. 17a. The court of appeals held that "the prosecution meets its Fifth Amendment burden of proving that compelled testimony is not used against a defendant when it produces a legitimate, wholly independent source for all matters as to which the witness will testify." *Ibid.* As the court stated, that standard "was taken directly from the language in *Kastigar*." *Ibid.*

Applying the independent source standard derived from *Kastigar*, the court correctly concluded that Briseno's testimony was not tainted. As the court explained, "Briseno was an eyewitness to the events at issue in the trial and thus had independent personal knowledge of the events to which he testified." Pet. App. 20a.

b. Koon contends (Pet. 19) that review in this case is warranted because the standard applied by the court of appeals for showing the absence of witness taint conflicts with the standard adopted by the D.C. Circuit in *United States* v. *North*, 910 F.2d 843 (*North I*), modified, 920 F.2d 940 (1990) (*North II*), cert. denied, 500 U.S. 941 (1991), and *United States* v. *Poindexter*, 951 F.2d 369 (1991), cert. denied, 113 S. Ct. 656 (1992). In those cases, the D.C. Circuit held that the government must show not only that there is an independent source for the testimony of a witness exposed to compelled statements, but also that the

witness has not shaped or altered his testimony in any way, as a result of that exposure. *North II*, 920 F.2d at 942; *North I*, 910 F.2d at 860, 872-873. That rule applies even when, as here, prosecuting authorities play no role in exposing the witness to the compelled statements. *North II*, 920 F.2d at 942, 944-945. As one court has stated, the D.C. Circuit's standard constitutes "the most expansive reading of the Fifth Amendment to date regarding the evidentiary use of immunized testimony." *United States* v. *Helmsley*, 941 F.2d 71, 82 (2d Cir. 1991), cert. denied, 502 U.S. 1091 (1992).

For several reasons, the conflict claimed by petitioners does not warrant this Court's review. First, in this case, petitioners testified in the state court trial before Briseno testified, and the content of their testimony was substantially the same as the content of their compelled statements. Pet. App. 20a; Gov't C.A. Br. 24 & Addendum. Nothing in the D.C. Circuit decisions suggests that it would apply its standard in such circumstances. To the contrary, the D.C. Circuit implied in *North II* that its rule would not apply when a defendant voluntarily testifies to events he has previously discussed under compulsion. 920 F.2d at 946 n.7. Second, in this case, the district court applied the D.C. Circuit's standard and found that Briseno's testimony was not affected in any way by his exposure to petitioners' compelled statements. Gov't C.A. Br. 17-18, 22-24. Because petitioners cannot benefit from an application of the D.C. Circuit standard, this is not a suitable case for deciding whether that standard is the proper one.

Finally, *North* and *Poindexter* both involved immunity conferred by federal statute, while the present case involves so-called *Garrity* immunity.

The D.C. Circuit has not yet had occasion to decide whether its standard should be extended to the *Garrity* context. As the court of appeals in this case noted, if the D.C. Circuit standard were applied in the *Garrity* context, "police officers could protect each other by compelling testimony and disseminating it widely, placing any criminal prosecution at serious risk and possibly barring prosecution altogether." Pet. App. 19a n.13. The conflict asserted by petitioners therefore does not warrant review in this case.[2]

3. Koon contends (Koon Pet. 22-24) that the district court improperly instructed the jury on the meaning of "unlawful force" and "custody" in connection with the count charging him with depriving King of his Fourteenth Amendment right to be kept free from harm while in official custody. That contention is without merit.

a. In *Logan* v. *United States*, 144 U.S. 263, 284 (1892), this Court held that a person taken into custody has a constitutional right to be protected "against assault or injury from any quarter." More recently, in *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 199-200 (1989), the Court explained that "when the State takes a person into its custody and holds him there against his will, the

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[2] The other circuit court decisions cited by Koon (Pet. 20) are inapposite. *United States* v. *Bartel*, 19 F.3d 1105, 1109-1114 (6th Cir.), cert. denied, 115 S. Ct. 113 (1994), involved the question of what showing the government must make to establish that a grand jury indictment has not been tainted by the grand jury's exposure to compelled statements. *United States* v. *Schmidgall*, 25 F.3d 1523, 1529-1532 (11th Cir. 1994), involved the question of what showing the government must make to establish that government agents have not themselves used compelled statements to shape a witness's testimony.

Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." Thus, as the court of appeals held (Pet. App. 46a), once King was in custody, Koon had a duty under the Fourteenth Amendment to protect King from the use of unlawful force by others, including other officers under his command. *United States* v. *Reese*, 2 F.3d 870, 887-890 (9th Cir. 1993), cert. denied, 114 S. Ct. 928 (1994); *United States* v. *McKenzie*, 768 F.2d 602, 604 (5th Cir. 1985), cert. denied, 474 U.S. 1086 (1986); *Lynch* v. *United States*, 189 F.2d 476, 478 (5th Cir.), cert. denied, 342 U.S. 831 (1951).

Koon contends (Pet. 22-24) that the district court erred in defining the unlawful force from which King had a right to be protected as "unreasonable" force, rather than as force that "amounts to punishment" or that "shocks the conscience." The court's definition was correct, however, because King was subjected to force applied by police officers during an arrest. Under *Graham* v. *Connor*, 490 U.S. 386, 395-397 (1989), the use of force during an arrest is unlawful if it is objectively unreasonable. Koon therefore had a duty to protect King from the use of unreasonable force by the officers under his command.

Koon errs in contending (Koon Pet. 22-23) that the court's decision conflicts with *United States* v. *Cobb*, 905 F.2d 784 (4th Cir. 1990), cert. denied, 498 U.S. 1049 (1991). In that case, the court of appeals held that the Fourteenth Amendment protects a *pretrial detainee* against the use of excessive force that amounts to punishment. 905 F.2d at 788. The court expressly recognized that an arrestee, such as the victim in this case, is protected against the use of unreasonable force. *Id.* at 788 n.7; see also *Graham*, 490 U.S. at 394-395 & n.10 (while arrestees are protected against the use of unreasonable force, pretrial detainees may only be protected against the use of force that amounts to punishment).

b. Koon's contention (Pet. 23-24) that the jury was improperly instructed on the meaning of custody is similarly without merit. The jury was instructed that a person is in official custody if "a reasonable person in that situation would have believed he or she was not free to leave." Pet. App. 51a. That instruction was drawn directly from this Court's decision in *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980). And while *Mendenhall* was a Fourth Amendment case, there is no reason that custody should be defined differently in the Fourteenth Amendment context. See *DeShaney*, 489 U.S. at 199-200 (Fourteenth Amendment right to be free from harm arises when state officials impose a limitation on a person's "freedom to act on his own behalf").

4. Koon contends (Pet. 24-30) that successive state and federal prosecutions of him for the same conduct violated the Double Jeopardy Clause. As Koon recognizes, however, this Court has repeatedly held that "the Constitution does not prohibit successive prosecutions by different sovereigns based on the same conduct." *Department of Revenue* v. *Kurth Ranch*, 114 S. Ct. 1937, 1947-1948 n. 22 (1994); see *Heath* v. *Alabama*, 474 U.S. 82 (1985); *Abbate* v. *United States*, 359 U.S. 187 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *United States* v. *Lanza*, 260 U.S. 377 (1922).

Koon contends (Pet. 27-28) that the dual sovereignty doctrine should be reexamined because it is inconsistent with the text and history of the Double Jeopardy Clause. This Court, however, has carefully considered those contentions before and soundly rejected them. The Double Jeopardy Clause provides

that no person shall be twice put in jeopardy for the "same offence." In using the term "same offence," the Framers incorporated the common law conception of crime as an offense against the sovereignty of the government. *Heath*, 474 U.S. at 88. Accordingly, "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences'." *Ibid.* The Court "has always understood the words of the Double Jeopardy Clause to reflect this fundamental principle." *Id.* at 93.

Moreover, if the Double Jeopardy Clause were not interpreted in that way, "undesirable consequences would follow." *Abbate*, 359 U.S. at 195. As the Court has explained, "if the States are free to prosecute criminal acts violating their laws, and the resultant state prosecutions bar federal prosecutions based on the same acts, federal law enforcement must necessarily be hindered." *Ibid.* At the same time, "no one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on acts which might also violate federal law." *Ibid.* Thus, the dual sovereignty doctrine "is not simply a fiction that can be disregarded in difficult cases. It finds weighty support in the historical understanding and political realities of the States' role in the federal system and in the words of the Double Jeopardy Clause itself." *Heath*, 474 U.S. at 92. Koon's contention that the doctrine should be reconsidered is without merit.[3]

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[3] Contrary to petitioner's view (Pet. 29), there is no "potential exception" to the dual sovereignty doctrine for cases in which a federal prosecution follows a state acquittal, rather than a state guilty verdict. As discussed above, the dual sovereignty doctrine rests on the view that state and federal prosecutions for the same conduct are not prosecutions for "the same offence" within the meaning of the Double Jeopardy Clause. It is therefore irrelevant whether the initial state prosecution results in a guilty verdict or an acquittal.

5. Powell argues (Pet. 10-18) that a government attorney's statement in closing argument that the Holliday videotape had caused "horror and outrage" from "Paris to Tokyo" impaired his right to a fair trial. Petitioner did not object to those remarks at trial, however. Pet. App. 40a. The court of appeals therefore examined the remarks under a plain error standard. *Ibid.* Finding that the remarks did not materially prejudice the outcome of the trial, the court concluded that they did not constitute plain error. *Id.* at 43a-45a.

In challenging the court of appeals' conclusion, Powell does not suggest that the court applied the wrong legal standard for assessing plain error. Instead, he argues only that the court came to the wrong conclusion based on the facts of this case. That fact-bound contention raises no issue of general importance and therefore does not warrant this Court's review.

In any event, the court of appeals correctly concluded that the remarks did not constitute plain error. As the court of appeals explained (Pet. App. 44a-45a), the improper remarks consisted of "a few sentences from a trial that lasted over a month and from detailed closing arguments that lasted many hours"; government counsel, defense counsel, and the district court all "admonished the jurors to base their verdict only on the evidence before them"; there was

"substantial independent evidence to support a finding of guilt"; and the acquittal of two of the defendants indicated that the jury was able to weigh the evidence "without prejudice." In those circumstances, the remarks did not materially affect the jury's ability to decide the case on the basis of the evidence before it.[4]

6. Powell argues (Pet. 18-22) that the admission of Briseno's videotaped state court testimony violated his rights under the Confrontation Clause. That argument is without merit.

Federal Rule of Evidence 804(b) permits the introduction of prior testimony if the party against whom the testimony is offered "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Because Rule 804(b) embodies a firmly rooted exception to the hearsay rule (see *Mattox* v. *United States*, 156 U.S. 237 (1895)), if testimony is admissible under that Rule, its admission is consistent with the Confrontation Clause. *Bourjaily* v. *United States*, 483 U.S. 171, 182-183 (1987).

As the court of appeals concluded (Pet. App. 5a-9a), Briseno's state court testimony was admissible under Rule 804(b). The state court did not interfere in any way with petitioners' ability to cross-examine Briseno, and since the issues in that trial were substantially similar to the issues in this case, petitioners had a similar motive to develop Briseno's testimony. *Id.* at 7a-9a.

[4] Powell asserts (Pet. 11, 15-18) that several other remarks made by government counsel were improper. As the court of appeals concluded, however, each of those remarks was properly designed to persuade the jury that petitioners' conduct was unreasonable, and that the jury was the ultimate arbiter of that issue. Pet. App. 40a-42a.

Powell contends (Pet. 18 & n.27) that he did not have an adequate opportunity to cross-examine Briseno at the state trial because he did not have access to enhancements to the Holliday video tape that might have made his cross-examination of Briseno more effective. Those enhancements, Powell points out, were not developed until after the state court trial. *Ibid.* But as the court of appeals explained (Pet. App. 8a), petitioners' "failure to take full advantage of their opportunity to cross-examine in the first trial—by developing [the enhancements] earlier—cannot alter the fact that they *had* the opportunity." The admission of Briseno's state court testimony therefore did not violate the Confrontation Clause.

7. Finally, Powell argues (Pet. 22-32) that the court of appeals erred in approving the district court's jury instructions on the definition of willfulness. In Powell's view (Pet. 24-25), the instructions were improper because they permitted the jury to convict on the basis of acts that were merely volitional rather than on the basis of acts undertaken with the specific intent of violating King's rights to be free from unreasonable force. See *Screws* v. *United States*, 325 U.S. 91, 107 (1945) (to act willfully under 18 U.S.C. 242, the defendant must have had "the purpose to deprive the [victim] of a constitutional right").

The jury was specifically instructed that "an act is done willfully if it is done voluntarily and intentionally, *and* with a specific intent to do something th[e] law forbids; that is, with an intent to violate a protected right." Pet. App. 52a (emphasis added). The jury was further instructed that "the required specific intent is the intent to use more force than is

reasonable under all of the circumstances," *ibid.*, and that the defendant must have "intended to accomplish that which the Constitution forbids." *Id.* at 53a. Those instructions clearly informed the jury that to satisfy the willfulness element the government was required to show not only that Powell intended to use force, but also that he intended for the force to be unreasonable. Accordingly, the court of appeals correctly rejected the claim that the instructions "allow[ed] the jury to convict on the basis of acts which were merely volitional, rather than undertaken with the specific intent to violate King's rights," *ibid.*, and that holding warrants no further review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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